No. 77-753 and 77-754

IN THE
Supreme Court of the United States
October Term, 1977

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,
v.
JOHN DANIEL, *Respondent*.

LOCAL 705, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOUIS F. PEICK, *Petitioners*,
v.
JOHN DANIEL, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) respectfully moves this Court, pursuant to Rule 42(1) of the Rules of this Court, for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioners in these cases.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 106 labor organizations representing approximately 13,500,000 employees throughout the United States. Those labor organizations are the

exclusive bargaining representatives for employees engaged in every facet of industry, commerce and government. They have secured pension coverage for many millions of employees who have received pnsion benefits, and for many millions who are presently working with the expectation of receiving benefits when they retire. In thousands of instances bargaining has resulted in the creation and maintenance of pension trusts which are jointly administered by unions and employers. Since the decision in these cases may well have a major impact on the administration of those plans, the AFL-CIO seeks this opportunity to acquaint the Court with its views.[1]

ISSUES TO BE COVERED IN THE AFL-CIO'S BRIEF AMICUS CURIAE

The accompanying brief *amicus curiae* attempts to avoid duplication of the arguments made by the petitioner and the other *amici* on the petitioners' side. Specifically, we do not address the questions of whether the Court of Appeals was right in holding that what it alternately terms "an interest in a pension plan" or "fund"[2] satisfies the elements

[1] On May 22, 1978 the petitioners, and several *amici curiae* supporting their position, filed their briefs. It is our understanding that the respondent has been granted to and including July 24 to file his brief.

Beginning on May 16 and continuing through June 22, the Senate debated H.R. 8410, the Labor Law Reform Bill of 1978, legislation which proposed a series of amendments to the National Labor Relations Act. Because of the far-reaching consequences for organized labor of those proposals, the AFL-CIO, the spokesman for the majority of trade unions, was required to devote full attention to that debate.

In light of that circumstance and the substantial time still available to the respondent for filing his brief, we request that the delay in filing this motion be excused.

[2] *E.g.* A. 219, 230, 234-236, 254, 259.

of a "security" laid down by this Court in *SEC* v. *W. J. Howey Co., Inc.*, 328 U.S. 293 and reaffirmed in *United Housing Foundation* v. *Forman*, 421 U.S. 837, or whether there is a "purchase" and "sale" within the meaning of the 1933 and 1934 securities laws when an individual takes or keeps a job which is covered by a private pension plan and when, as that court may also have held (compare A. 229, 242, 247 with A. 254, 255), union members vote to ratify a collective bargaining agreement which includes provisions with respect to a pension plan.[3] Rather we confine our argument to the practical consequences of the decision below on the day-today operations of private pension plans.

We discuss those consequences because the Court of Appeals was evidently moved by its perception that interpreting the securities laws to cover this transaction was necessary and desirable. (A. 232, 241-242, 254-259.) In our view, the basic policy judgments have already been made in Congress, first, when it enacted the securities laws in question to achieve certain goals relating to an important but discrete problem in our economy, and again in 1958 and 1974 when it enacted legislation specifically regulating private pension plans. But even if those judgments are not controlling, as we think they should be, at a minimum the determinations which

[3] In our brief *amicus curiae* in support of the petitions for certiorari in these cases, we noted our concern that the decision below creates large potential liabilities for pension plans, which would have a grave adverse impact on current plan participants. We have not renewed that argument because this Court has since expressed its appreciation of these practical realities and has therefore held that "the rules that apply to [pension and insurance] funds should not be applied retroactively unless the legislation has plainly commanded that result." (*Los Angeles Department of Water and Power* v. *Manhart*, 46 U.S.L.W. 4347, 4350 (April 25, 1978).)

Congress made in its pension legislation, particularly with respect to the disclosure obligations which pension plans have to their participants, deserve respectful judicial attention in assessing the Court of Appeals' view of what "makes good sense" (A. 254). Accordingly, we do not simply set forth our own perceptions why the decision below would have adverse consequences on the administration of pension plans—and both directly and indirectly on the participants and beneficiaries—but compare the regime of securities laws with those established by Congress in its 1958 and 1974 pension enactments. In particular we show that the decision below imposes on pension plans burdens—which Congress did not intend and indeed sought to avoid—in four respects: 1) It creates uncertainties as to what the disclosure obligations are; 2) it creates at least one, and probably many, additional disclosure requirements; 3) it requires disclosures to participants at times different from those intended by Congress; and 4) it subjects pension plans to regulation by an additional agency, which was not the chosen instrument of Congress, and which, indeed, once declined the task as unsuited to its expertise.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

SUMMARY OF ARGUMENT

We show below that application of the securities laws [1] to

[1] The Securities Act of 1933, 48 Stat. 74, as amended (15 U.S.C. § 77(a) *et seq.*), and the Securities Exchange Act of 1934, 48 Stat. 881, as amended 15 U.S.C. § 78(a) *et seq.*).

non-contributory involuntary pension plans would be inconsistent with the disclosure mechanisms which Congress has established [2] because it would impose on pension plans burdens—which Congress did not intend and indeed sought to avoid—in four respects: 1) It creates uncertainties as to what the disclosure obligations are; 2) it creates at least one, and probably many, additional disclosure requirements; 3) it requires disclosures to participants at times different from those intended by Congress; and 4) it subjects pension plans to regulation by an additional agency, which was not the chosen instrument of Congress, and which, indeed, once declined the task because as unsuited to its expertise.

ARGUMENT

1. *Uncertainties.* According to the Court of Appeals, the conflicts with the policies of Congressional pension regulation and the difficulties which the defendants and supporting *amici* below anticipated, are avoided by its holding that although the antifraud provisions are applicable to the relationship between private pension plans and their participants, the registration provisions are not. (A. 252).[3] But in deriving that conclusion from its holding the Court drew an inaccurate contrast. It is true that the registration provisions alone require "filing of a registration statement and the delivery of a prospectus containing detailed information about the security and its issuer" and that "the anti-fraud provisions do not establish an affirmative disclosure system

[2] Employment Retirement Income Security Act of 1974, 88 Stat. 832 (29 U.S.C. § 1001 *et seq.*), and its predecessor, the Welfare and Pension Plans Disclosure Act of 1958, 72 Stat. 997, as amended (29 U.S.C. § 301 *et seq.*).

[3] That court's reliance on a 1970 amendment to the 1933 Act as the source of an exemption from registration for pension plans "maintained by a bank * * *" (see A. 236-242) is forcefully controverted on petitioners' side. We shall not enter into this controversy, and for the purpose of this discussion only assume that the registration provisions are inapplicable.

requiring the filing of documents." (*Id.*) But the anti-fraud provisions *do* "establish an affirmative disclosure system"; it is after all the failure to make affirmative disclosures which is the gravamen to the complaint herein, and the Court of Appeals itself imposes a wholly novel affirmative disclosure obligation just two paragraphs later in its opinion (A. 254-255 discussed at pp. 10-12 *infra.*).[4] So, too, the anti-fraud provisions, no less than the "registration provisions are designed to assure that investors wil be furnished with all material information concerning an informed investment decision." (A. 252)

An unofficial article co-authored by the present General Counsel of the Securities and Exchange Commission (SEC) expresses a view of the anti-fraud provisions which is at sharp variance with, and we think far more accurate than, that expressed by the court below:

> The disclosure requirements of the federal securities laws which are applicable to the transactional context are the antifraud strictures contained in several of the statutes administered by the Commission, the registration provisions of the Securities Act, and the tender-offer sections of the Securities Exchange Act. Both the antifraud and registration provisions are directly related to disclosures which must be made in the context of a proposed securities transaction. Each assumes that prior to making an intelligent investment decision an investor must be furnished with certain facts. In the registration context, the potential purchaser is supplied with a statutory prospectus which describes the operations of the company, the use of the

[4] Of course, given the affirmative disclosure requirements of the 1958 and 1974 Acts, pension plan administrators have not had and do not have the option—even if it were otherwise practicable—to adopt a pension plan and give employees no information whatsoever. Thus, if the anti-fraud provisions apply they create an affirmative disclosure obligation for all pension plans.

proceeds, the persons in control, and, as a general proposition, a variety of facts dealing with the investment value of the securities being offered, or financial matters relating to the company's operations. Disclosures held to be required by the antifraud provisions of the securities laws, however, have been even more far-ranging, and of course, have not been limited to disclosures by issuers. At the very least it is safe to assert that the disclosures which are material in the registration context are within the same genre of disclosure which are required by the antifraud provisions of the federal securities law.[5]

Moreover, when the Court of Appeals says that "the antifraud provisions are essentially a generalized self-executing prohibition against fraudulent activity" (A. 252), it neither conveys anything about the meaning of "fraudulent activity" in the securities laws context nor describes the obligations this "generalized self-executing prohibition" entails. Indeed, the very fact that it is "generalized" and "self-executing" gives rise to hazards and uncertainties which Congress did not intend to subject pension plan administrators and trustees, as we now show.

A. The philosophy of the securities laws has been described by Professor Loss:

> The courts have traditionally refused, whether at common law deceit or under securities laws, to define fraud with specificity. Were any hard and fast rule to be laid down as to what constitutes fraud under the blue sky law, the Oregon court has said, "a certain class of gentlemen of the 'J. Rufus Wallingford' type—'they toil not neither do they spin'—would lie awake nights

[5] Sonde & Pitt, *Utilizing the Federal Securities Laws to Clear the Air! Clean the Sky! Wash the Wind!*, 16 How. L. J. 831, 852-854. (1971), (footnotes omitted).

> endeavoring to conceive some devious and shadowy way of evading the law. It is more advisable to deal with each case as it arises."[6]

The same attitude was expressed in a letter of Lord Hardwicke to Lord Kames dated June 30, 1759, which was re-quoted in *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180, 193, n. 41:

> Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species or evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive.

Accordingly, it is the SEC's practice not to advise parties in advance as to what disclosures must be made in order to comply with the anti-fraud provisions of the 1933 and 1934 Acts and its own Rule 10b-5.

B. The underlying assumptions of the pension laws are entirely different. Congress recognized that those who sponsor and administer pension plans are not trying to obtain money from employees or employers for their own enrichment; after all, these plans are financed by the contributions of the very employers who established them unilaterally or in bargaining with unions. It believed that the interest of pension plan participants in knowing what they needed to know about their pension plans, and the practical exigencies of operating a pension plan are best served by providing explicitly what must be disclosed, to whom, and when. Accordingly, in 1958, and more elaborately in 1974, it established very clear guidelines for admin-

[6] 3 Loss, *Securities Regulation*, 1435-36 (2d Ed., 1961) (footnote omitted) quoting *State* v. *Whiteaker*, 118 Ore. 656, 661, 247 Pac. 1077, 1079 (1926).

istrators [7] setting forth the information which must be made available to pension plan participants, the Secretary of Labor and the public. Let us see what Congress has done.

(i) Disclosure under the WPPDA. Section 5(a) of the Welfare and Pension Plans Disclosure Act of 1958 required the "administrator" (as defined in § 5(b)) of any employee pension (or welfare) benefit plan to "publish in accordance with section 8 to each participant or beneficiary covered thereunder (1) a description of the plan and (2) an annual financial report." The description and report were to contain the information "required by §§ 6 and 7 of this Act in such form and detail as the Secretary shall by regulations prescribe."

In § 6(b) of the WPPDA Congress specified with particularity the information which the plan description was required to provide. (See pp. 1a-2a, *infra.*) Section 7(b) specified the information which all pension pans were required to provide in their annual reports. (See pp. 2a-3a *infra.*) Additionaly, all pension plans funded through the medium of a trust were also required to report therein "(A) the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of employees both retired and nonretired covered by the plan." and (B) "a statement showing the assets of the fund as required by section 7(b)" (§7(f)(1)).

[7] Except as specifically indicated otherwise, the term "administrator" as used in this brief will include all persons who would be subject to the disclosure obligations of the security laws under the decision below.

[8] Additionally, the annual report was to contain, subject to certain exemptions, detailed lists of all investments and securities or properties of the employer or employer organizations, or any other party or interest, and all loans made to any of the foregoing. (§§ 7(f)(1)(C) & (D)). Section 7(f)(2) set forth additional information required of plans which were "funded through the medium of a contract with an insurance carrier". (See pp. 3a-5a, *infra*).

Publication of the plan (and amendments thereto) and annual reports to participants and beneficiaries covered thereby was to be made in two ways: (1) by making copies available for their examination in the principal office of the plan; and (2) by mailing the plan description (including amendments, etc.) as well as "an adequate summary" of the latest annual report to the last known address of any participant and beneficiary who requested the same in writing (§ 8(a)). The plan administrator was also required to file two copies of the plan description and each annual report with the Secretary of Labor, who was to make them available for public examination (§ 8(b). The times for publication and filing were also set forth (§§ 6(a), 6(b), 47(a)).

(ii) Disclosure under ERISA. When, after lengthy study, Congress enacted the Employment Retirement Income Security Act of 1974 (ERISA), which repealed and supplanted the WPPDA, it retained the basic approach of the 1958 Act that plan administrators were to be instructed as to their disclosure duties.

a) In ERISA, Congress determined for the first time that pension plan participants and beneficiaries were to be furnished information about the plan automatically, rather than on request, as under § 8(a) of the 1958 Act. At the heart of the new disclosure mechanism is the summary plan description described in § 102(a) (1):

> The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall

be furnished in accordance with section 104(b) (1) of this act.

And Congress spelled out what information it believed to be of particular interest to plan participants and beneficiaries; § 102(b) provides:

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provision providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act).

A copy of the summary plan description is to be provided to any participant within 90 days of his employment and an updated copy thereof must, on written request of any participant or beneficiary, be mailed to him.[9] (§§ 104(a) (1), 104(b) (1).) This document, as well as the plan description, must be filed with the Secretary of Labor, who shall also make them available to the public, (§ 104(a) (1)).

[9] The administrator may make a reasonable charge to cover the cost of furnishing copies of the summary plan description, or any other material required to be mailed on written request by § 104(b)(4).

b) ERISA also requires plans to publish an annual report. Section 103(b)(2) requires all pension plans to include therein a formal statement; § 103(b)(3) lists eight separate schedules which must be attached to that statement; § 103 (c) prescribes certain information to be provided by the "administrator" (defined in § 3(16)(A)). Section 103(d) requires an actuarial statement of most funded pension plans.[9] The required contents of each of these statements is meticulously spelled out in the Act. (See pp. 13a-14a, *infra.*)

The complete annual report must be filed with the Secretary of Labor (who shall make it available to the public) but need not be furnished to the plan participants except by mail upon written request, and by being made available at the principal plan office. (See §§ 104(b)(2) and (4).) Each participant is entitled only to receive a copy of the statements of assets and liabilities of the plan, and of its receipts and disbursements during the preceding 12-month period, and "such other materials as is necessary to fairly summarize the latest annual report" (§ 104(b)(3)).[10]

In sum, by subjecting pension plan administrators to the inherent uncertainties of the anti-fraud provisions of the securities laws the decision below contravenes the Congressional design. While it is easy enough to say that persons should not "defraud" other persons, the concept of "fraud" under the securities laws has become so broad, particularly with respect to the obligation not to omit

[10] This requirement is implemented by a regulation of the Secretary of Labor (29 C.F.R. § 2520.104b-10(c), 41 F.R. 16694 (Apr. 23, 1976). We are advised that it is the general practice to furnish as a summary annual report, in addition to the two financial statements, a copy of the front page of the annual report which gives the names and addresses of the plan's sponsors and administrator and describes the nature of the plan.

material facts, that the problems of compliance are serious indeed. Moreover, the characteristics of a private pension plan are so different from those of the "types of instruments" that have previously been held to "fall within the ordinary concept of a security" (cf. H.R. Rep. No. 85, 73rd Cong., 1st Sess. 11) that the existing body of judicial and administrative decisions will provide little if any guidance as to what must be disclosed to comply with the anti-fraud provisions. Thus, the very novelty of the decision below will exacerbate the problems it raises for those who would be responsible for making disclosures under that legal theory.

2. *Scope of the Disclosure Requirement.* A. In affirming the District Court's denial of the Motion to Dismiss the Complaint, the court below addressed itself to only one of the several "misrepresentations" and "omissions of material fact" (A. 32) which were alleged in the Complaint. It declared that a plan must disclose "a statistically determinable risk that many employees covered by a plan will never receive their pension benefits." (A. 255)

The Court of Appeals did not elaborate on what this "statistically determinable risk" represented, but its earlier reference to the District Court's opinion evidnces that the court meant thereby "the actuarial probability, here perhaps as low as 8% (410 F. Supp. at 551 [A. 123-124]), that a member actually will receive pension benefits." (A. 216). It must be noted at once that the "8%" figure refers to a Senate study of 87 pension plans which "established that forfeiture of pension benefits by plan participants was extremely high, in that 92 per cent of all participants *who left plans* which required 11 or more years of service for vesting and 72 per cent of all participants in the plans with 10 years or less for vesting did not qualify for benefits upon termination of employment."[11] Excluded from these figures were the large number of individuals who remained in those

[11] S. Rep. No. 92-634, 92d Congress, 2d Sess., cited at A. 123-124 (emphasis added).

plans until retirement and ultimately obtained benefits.[12] Accordingly, the 8% figure *does not* represent the probability (even among the plans studied) "that a member actually will receive pension benefits." (A. 216).

Moreover the principal vice in the requirement that that "actuarial probability" or its converse, "the statistically determinable risk * * *" (A. 254), be disclosed is that such information would be misleading to the individual who receives it. Precisely because it is a *statistic*, this figure says nothing about the prospects of any given individual. This point is well made in the brief *amicus curiae* for the American Academy of Actuaries, pp. 3 to 14, particularly at pp. 11 to 14, discussing the nature of statistical data. It is distressing that the court below should have declared a rule which would compel pension plans "to develop and present to individual employees quantitative information which" the experts in the field have determined "will be incorrect, misunderstood, and of little or no value in assessing the likely future course of [those individual employees'] working careers or the decisions they must make in connection with their employment." (*Id.* at 14.)[13]

One further observation is in order in this connection Congress was fully aware of the importance of actuarial assumptions in the establishment and maintenance of financially viable pension plan, and the necessity of disclosing these actuarial assumptions and any modifications therein. As we have noted, p. 9 *supra*, § 103(d)(3) requires most employee pension plans to have an actuarial statement in their annual report. That statement must include substantial statistical data including actuarial assumptions and a justification for any change therein (§ 103(d)(3)). (See pp. 13a-14a, *infra*.) But Congress did not believe that *any*

[12] See also the underlying study at pp. 125-126 of the Senate Report, and accompanying tables.

[13] That brief also cautions that the actuarial assumptions which are made in planning frequently turn out to be wrong, but the errors are self-correcting because new actuarial determinations are made annually. (See *id.* at p. 10, text and note at n. 15.)

actuarial information was of sufficient importance or utility to participants to require that it be conveyed in the summary plan description, see § 102(b), quoted at p. 8, *supra*. And, of course, it did not require, either in the WPPDA or ERISA, that pension plans disclosed to participants or to the Secretary the meaningless and misleading "statistically determinable risk" which the court below requires to be disclosed.

This itself should caution against substituting the open-ended obligations of the securities laws for the specific disclosure rules established by Congress. The contrast between the Court of Appeals' approach and that of Congress is further heightened when it is considered whether pension plans would be required, under the decision below, to disclose to participants their policies in investing assets of a funded plan. The Court of Appeals' holding that there is a securities transaction rested heavily on a supposed analogy between pension plans on the one hand and mutual funds (A. 231, 234, 235, 241), and variable annuities (A. 226-227, 231) on the other. Issuers of such securities are, of course, required to disclose their investment policies and changes therein in detail. Thus, if that court's anology is sustained, as it would have to be, at least tacitly, to affirm its "security" holding, plan administrators would rely at their peril on their own knowledge that the economic contexts and other characteristics of pension plans are so different from mutual funds, variable annuities, etc., that such investment information would not be "important" to a reasonable pension plan participant. (Cf. *TSC Industries, Inc.* v. *Northway*, 426 U.S. 438, 449.) Congress, however, has never required that this information be provided plan participants, or even published in the annual report.[14] Congress thereby made clear its judgment that, unlike the information which must be disclosed in the summary plan description or otherwise, the plan's investment policies are a relatively minor utility to its participants.[15] Again, if that assessment, embodied in ERISA's disclosure provisions, is not binding on the courts, it should at least be deemed highly persuasive. In any event, it is eminently sound, because investment performance has only a limited and indirect effect, if any, on participants in non-contributory, defined benefit plans.

[14] What ERISA does require is that investments held be listed in the annual report as part of the statement of assets (§ 103(b)(3)(C)), and that certain types of transactions, including any investment which involves more than 3 percent of the plan's assets be disclosed (§ 103(b)(3)(H)).

The investment success of a defined benefit plan will be to the advantage of the employee participant only if the employer (or employers, in a multi-employer plan) who sponsors the plan chooses to raise the level of benefits. (Cf. *Alabama Power Company* v. *Davis*, 431 U.S. 581, 594.) If the level of benefits is kept the same, a more favorable investment performance than had been anticipated in the actuarial forecast would enable the employer to reduce his contributions; and of course, if the investment income is less, the employer would have to increase his contributions to maintain those benefits. But either way, the investment results affect the participants only indirectly, that is, they make it somewhat easier for the employer to provide higher benefits.[16]

[15] This determination strongly suggests also, that if Congress considered former SEC Chairman Cohen's comparisons between pension plans and mutual funds, it (contrary to the Court of Appeals, A. 235) regarded the differences which he described as more important than the similarities. See Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 3598, 92d Cong., 2d Sess., p. 231, quoted in part at A. 235 and IBT Br. 43, n. 29.

[16] Of course, where the level of the defined benefits is collectively bargained, employers generally will be more willing to promise higher benefits to the extent that the contributions required are less because of the plan's investment income; but there too, the impact on the employees is indirect, and their own bargaining strength is at least an equally significant fact.

C. If the anti-fraud provisions of the security laws apply, then whatever other disclosure may be or may not be required, plan participants would clearly be entitled to two kinds of information which they have not hitherto received: 1) information relating to the possibility that the employer, whose contributions fund the plan, will close down the plant where the participant is employed or otherwise liquidate his business in whole or in part, and 2) the employer's financial situation and prospects.[17] For, such information would indisputably be deemed material by a reasonable plan participant and would be subject to disclosure under the "investment" theory of the decision below. Specifically, both kinds of information relate directly to what is termed below "risk of loss" (A. 254)— that is, the possibiity that the employee will never obtain a pension. The financial information concerning the employer is aso relevant to the amount of the benefit if the employee does get a pension, beause the employer's financial condition will almost certainly have a direct effect on benefits due to its obvious influence on his ability and willingness to make or increase the contributions which are the primary and major source of the plan's assets.

1) In a study of pension plan terminations prepared by the Treasury and Labor Departments, it was stated that the "most frequently given reasons for plan termination were adverse business earnings and the liquidation or dissolution of employer organization."[18]

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[17] In multi-employer plans, the pertinent information would include also the financial situation and prospects of the contributing employers, and often of the employing industry.

[18] Study of Pension Plan Terminations, 1972—Final Report (Department of the Treasury, Department of Labor, August 1973 hereafter "Terminations Study"), pp. 48-51. The Terminations Study was before Congress when it was enacting ERISA. See Legislative History of the Employee Retirement Income Security Act of 1974 (GPO 1976) (hereafter "ERISA Leg. Hist."), p. 1599 (Senator Williams).

The Terminations Study explained:

> Of the 1,227 plans, 580 gave one or the other reason. Another 66 gave one or both in combination with other reasons. In all cases where combinations of reasons were given for termination, at least one of these two reasons was cited. Together, plans citing at least one of these reasons accounted for 40 percent of all claimants and 38 percent of all claimants with losses. In addition, while the study identified and separated those cases where a plan termination was due to the closure of a plant, division or subsidiary of a company, the closures themselves in several cases were due to adverse earnings or liquidation of the company production unit. About 10 percent of all claimants and about 9 percent of claimants with losses were in plans terminated because of change of ownership by sale or transfer. A much smaller percentage of claimants were in plans terminating because of a change of ownership by merger.

Id. at 51. See also Table, *Distribution of Pension Plans and Claimants by Reason for Termination,* 1972," *id.*, p. 50. Examples of individuals who had lost pension benefits because of plant closings were given by Senator Wiliams at the opening of the debate on the bill which became ERISA.[19]

The Terminations Study also stated:

> Seventy-one plan terminations involved the closure of a plant, division, or subsidiary by a parent company. These plans accounted for 23 percent of all claimants. The 29 such plans that terminated with losses accounted for 29 percent of all claimants with losses.[20]

As the Terminations Study explained:

> While a number of other specific reasons may be

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[19] ERISA Leg. Hist. p. 1059. See also *e.g.*, *id.* at pp. 1634-1638 (Senator Bentsen), 1866-1868 (describing individual cases), 2602.

[20] Terminations Study, p. 51.

given for a plan termination, a decline in the number of active participants in a plan can itself indirectly encourage a termination. Of course, a decline in the number of active participants prior to termination may be simply a reflection of an increasingly unprofitable employer. But for a plan with large, unfunded, past service liabilities, a decline in the number of participants, particularly younger participants, can cause a sharp rise in costs per employee remaining in the plan.

The great majority of plans for which information is available showed declines in participation prior to termination. This is true both for plans with losses and those without. As a rule, a reduction in employment involves a disproportionate decline in the number of younger employees, either through reduced hiring or lay-off. If past service liabilities have not been funded, such a reduction in the number of younger participants raises per capita costs for the remaining employees because the younger employees account for less than a proportionate share of past service liabilities. Thus, for a poorly funded plan, the increased costs per remaining participant of maintaining a plan can be a contributing factor in a decision to terminate it.[21]

And, short of a decision to terminate, the increased cost of past service liabilities per remaining employee will make it that much more difficult for the plan to increase benefits, beause greater contributions will be needed simply to achieve the originally projected level of benefits. So too, where financial conditions have caused an employer, who is a major contributor to a multi-employer plan, to withdraw therefrom, the result may even be that expected benefits will be significantly reduced.[22]

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[21] *Id.* at p. 47-48.

[22] This is what happened to the New Jersey Brewery Employees' Pension Plan because of the closure of P. Ballentine & Sons. See *id.* at 52, n. 3, and ERISA Leg. Hist. at p. 1600.

Second, if the operation is unprofitable even in the short run, the employer may be forced to lay off workers; those who thereby lose their jobs will not only be deprived of their source of wages (which is usually of primary importance to them) but will forfeit the opportunity of ever satisfying the conditions of eligibility under that pension plan. A reduction in the employee force will also affect those employees who remain and ultimately do obtain a pension.

We can think of good reasons why employers should be required to warn their employees when a major business decision affecting their jobs is in the offing, but we are also aware that such a duty would be bitterly resisted by employers.[23] But that is a decision for Congress, and it seems to us to be an unprincipled resolution—which nothing that Congress has ever done would justify—to make the employer's duty to do so depend on whether he sponsors a pension plan. And while employers who have financed their businesses by entering into the capital market which is the true focus of the securities laws are, of course, required to make elaborate disclosures under those laws, other employers are not presently under such a duty; doubtless many have chosen alternate methods for securing capital precisely to preserve the confidentiality of their financial

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[23] Where the employees are represented, § 8(a)(5) of the NLRA does require that the union be given information at least soon enough to bargain with the employer about the consequences of this decision, although right to go out of business has been held to be absolute. See *e.g., NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (duty to provide information); *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203 (mandatory subjects of bargaining); but see, *Textile Workers* v. *Darlington Mfg. Co.*, 380 U.S. 263 (right to go out of business).

position and business plans.[24] Again, it is not a light thing for the courts to require them to provide their employees with financial information because the employers have established a pension plan; yet, the creation of just such a duty is implicit in the Court of Appeals' holding herein.

3. *Timing.* With respect to the timing of the disclosures under its decision, the Court of Appeals takes a position flatly contrary to that of Congress in enacting ERISA. Indeed, that court points to the difference as one of the reasons why its "reading the antifraud provisions of the securities laws be complementary to the requirements of ERISA makes good sense." (A.254.) The court below says: "Defendants have not shown that ERISA would provide relief to persons who have acquired an interest in a pension fund where false or misleading representations have been made *at inception or during subsequent ratifications or upon a job offer,*" at which times it would require disclosure. (A. 254-255, emphasis added.) Section 104(b)(1)(A) of ERISA, on the other hand, requires that the summary plan description be provided any time within 90 days after an individual accepts employment, the event which the court characterizes as an "investment commitment". (*Id.*) And under the WPPDA, the administrators were not at all required to provide a participant with information, except on written request or at the plan offices. (See p. 7 *supra.*)

In addition to the foregoing admitted inconsistency between the court below's requirements and those of ERISA, that court's opinion would create substantial uncertainty as to when, after initial employment, an existing plan must make disclosures. Its theory that there is a "sale" when an employee decides to retain his job would appear to entail continuing disclosure obligations. Unless by "job offer"

[24] An employer also has the duty to provide financial information to a union in collective bargaining, at least if he asserts a financial inability to meet the union's demands. See *Labor Board* v. *Truitt Mfg. Co.*, 351 U.S. 149.

that court meant not only the offer to begin covered employment but also a continuing offer to remain in covered employment, the opinion does not identify the occasions when disclosure is required (by an existing plan) other than contract ratification where the union provides for ratification. And it would appear from the discussion of that court's difference with ERISA (A. 255) that the securities laws would not require disclosure to individuals who are already employed after the plan is in operation, except, again, where there is ratification. But it would be hazardous for administrators to rely on this reading of the opinion, given its "sale" theory. They may feel compelled, for safety's sake, to make continuing disclosures to employees whenever there is any development which might be considered "material," a task all the more onerous because of the uncertainties surrounding what is material in this context. (See pp. 2-5 & 12-18, *supra.*)

Here again, Congress has been quite specific. The WPPDA required that the plan description be published within 90 days after the inception of the plan (or the effective date of the Act). (WPPDA § 6(a).) Changes in the plan were to be reported to the Secretary within 60 days after the change was effectuated (§ 6(b).) The annual reports were to be published within 150 days after the end of the plan year (§ 7(b).)

Under ERISA, any changes in the plan with respect to a matter required to be disclosed in the summary plan description is to be filed with the Secretary within 60 days after such modification is adopted, but can be distributed to plan participants at any time within 210 days after the end of the plan year in which the change is adopted. (See ERISA § 104(a)(1)(D) and § 104(b)(1).) One practical consequence of these provisions is, of course, that all changes which are adopted in one year and even longer can be furnished to the participants in a single document. A revised summary plan description incorporating all changes must be provided every five years (or ten years if

there are no amendments). (§ 104(b)(1).) The information which must be contained in the annual report may be filed with the Secretary and made available to participants anytime within 210 days after the close of the plan year. (See § 104(a)(1)(A); § 104(b)(1)).) Plainly, these provisions minimize the cost to the plan (thereby preserving its funds for the payment of benefits) and protect the participants from being inundated with material. Moreover, they show that Congress clearly did *not* believe that plan participants had an *immediate* need for that information. Thus, ERISA's approach strongly suggests that, unlike the Court of Appeals, Congress did not consider an employee to be making an investment decision by continuing in covered employment.

4. *Duplicative and Conflicting Statutory Requirements and Administration.* In § 3004(a) of ERISA, Congress gave the following extraordinary instruction to the two Departments in which it vested responsibility for administering that law:

> Whenever in this Act or in any provision of law amended by this Act the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which, to the extent appropriate for the efficient administration of such provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.

See also § 3004(b) reprinted at p. 16a, *infra*. To sustain the holding below that the securities laws are applicable would make inevitable the "duplication of effort," etc., which Congress strove to avoid, and would do so by authorizing the intrusion of another agency, the SEC, which was not

one of the instruments chosen by Congress to regulate pension plans and to oversee compliance by them with their duty to provide adequate information to their participants. In investing responsibility in agencies other than the SEC, Congress adhered to a judgment it first made in 1958 when it determined that that agency did not possess the necessary expertise in labor-management affairs. At that time the SEC agreed with that assessment, and indeed encouraged Congress to leave pension regulation to others, particularly the Department of Labor. (See IBT Br., pp. 68-72.) That the SEC has now changed its position cannot justify overturning the decisions which Congress in § 3004 has made, and thereby imposing the "burden of compliance" with conflicting or overlapping requirements on "plan administrators, employers, and participants and beneficiaries."

CONCLUSION

For the foregoing reasons and those stated by petitioners, the judgment of the court below should be reversed and the case remanded with direction to the District Court to dismiss Counts I and II of the complaint.

Respectfully submitted,

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APPENDIX

I. Excerpts from the Welfare and Pension Plan Disclosure Act of 1958 (WPPDA), 72 Stat. 997, *et seq.*, 29 U.S.C. § 301 *et seq.* (repealed effective January 1, 1975).

Section 6, WPPDA, provided as follows:

(a) Except as provided in section 4 of this Act, the description of any employee welfare or pension benefit plan shall be published as required herein within ninety days of the effective date of this chapter or within ninety days after the establishment of such plan, whichever is later.

(b) The description of the plan shall be published, signed, and sworn to by the person or persons defined as the "administrator" in section 5 of this Act, and shall include their names and addresses, their official position with respect to the plan, and their relationship, if any, to the employer or to any employee organizations, and any other offices, positions, or employment held by them; the name, address, and description of the plan and the type of administration; the schedule of benefits; the names, titles, and addresses of any trustee or trustees (if such persons are different from those persons defined as the "administrator"); whether the plan is mentioned in a collective bargaining agreement; copies of the plan or of the bargaining agreement, trust agreement, contract, or other instrument, if any, under which the plan was established and is operated; the source of the financing of the plan and the identity of any organization through which benefits are provided; whether the records of the plan are kept on a calendar year basis, or on a policy or other fiscal years basis, and if on the latter basis, the date of the end of such policy or fiscal year; the procedures to be following in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part. Amendments to the plan reflecting changes in the data and information included in the original plan, other than data and informa-

tion also required to be included in annual reports under section 7 of this Act, shall be included in the description on and after the effective date of such amendments. Any change in the information required by this subsection shall be reported to the Secretary within six days after the change has been effectuated.

Section 7, WPPDA, provided in pertinent part as follows:

(a) The administrator of any employee welfare or pension benefit plan, a description of which is required to be published under section 6 of this Act, shall also publish an annual report with respect to such plan if it covers one hundred or more participants. However, the Secretary, after investigation, may require the administrator of any plan otherwise covered by the chapter to publish such report when necessary and appropriate to carry out the purposes of the chapter. Such report shall be published as required under section 8 of this Act, within one hundred and fifty days after the end of the calendar year (or, if the records of the plan are kept on a policy or other fiscal year basis, within one hundred and fifty days after the end of such policy or fiscal year).

(b) A report under this section shall be signed by the administrator and such report shall include the following:

The amount contributed by each employer; the amount contributed by the employees; the amount of benefits paid or otherwise furnished; the number of employees covered; a statement of assets specifying the total amount in each of the following types of assets: cash, Government bonds, non-Government bonds and debentures, common stocks, preferred stocks, common trust funds, real estate loans and mortgages, operated real estate, other real estate, and other assets; a statement of liabilities, receipts, and disbursements of the plan; a detailed statement of the salaries and fees and commissions charged to the plan, to whom paid, in what amount, and for what purposes. The Secretary, when he

has determined that an investigation is necessary in accordance with section 9(d) of this Act, may require the filing of supporting schedules of assets and liabilities. The information required by this section shall be sworn to by the administrator, or certified to by an independent certified or licensed public accountant, based upon a comprehensive audit conducted in accordance with acceptance standards of auditing, but nothing herein shall be construed to require such an audit of the books or records of any bank, insurance company, or other institution providing an insurance, investment, or related function for the plan, if such books or records are subject to examination by any agency of the Federal Government or the government of any State. In the case of reports sworn to, but not certified, the Secretary, when he determines that it may be necessary to investigate the plan in accordance with section 9(d) of this Act, shall, prior to investigation by the Department of Labor, require certification of the report by an independent certified or licensed public accountant.

* * * *

(e) Details relative to the manner in which any funds held by an employee welfare benefit plan are held or invested shall be reported as provided under paragraphs (B), (C), and (D) of subsection (f)(1) of this section.

(f) Reports on employee pension benefit plans shall include, in addition to the applicable information required by the foregoing provisions of this section, the following:

(1) If the plan is funded through the medium of a trust, the report shall include—

(A) the type and basis of funding, actuarial assumptions used, the amount of current and past service liabilities, and the number of employees, both retired and nonretired covered by the plan;

(B) a statement showing the assets of the fund as required by section 7(b) of this Act. Such assets shall be

valued on the basis regularly used in valuing investments held in the fund and reported to the United States Treasury Department, or shall be valued at their aggregate cost or present value, whichever is lower, if such a statement is not so required to be filed with the United States Treasury Department;

(C) a detailed list, including information as to cost, present value, and percentage of total funds, of all investments in securities or properties of the employer or employee organization, or any other party in interest, but the identity of all securities and the detail of brokerage fees and commissions incidental to the purchase or sale of such securities need not be revealed if such securities are listed and trade on an exchange subject to regulation by the Securities and Exchange Commission or securities in an investment company registered under the Investment Company Act of 1940, or securities of a public utility holding company registered under the Public Utility Holding Company Act of 1935, and the statement of assets contains a statement of the total investments in common stock, preferred stock, bonds and debentures, respectively, valued as provided in subparagraph (B).

(D) a detailed list of all loans made to the employer, employee organization, or other party in interest, including the terms and conditions of the loan and the name and address of the borrower: *Provided*, That if the plan is funded through the medium of a trust invested, in whole or in part, in one or more insurance or annuity contracts with an insurance carrier, the report shall include, as to the portion of the funds so invested, only the information required by paragraph (2) below.

(2) If the plan is funded through the medium of a contract with an insurance carrier, the report shall include—

(A) the type and basis of funding, actuarial assumptions used in determining the payments under the contract, and

the number of employees, both retired and nonretired, covered by the contract; and

(B) except for benefits completely guaranteed by the carrier, the amount of current and past service liabilities, based on those assumptions, and the amount of all reserves accumulated under the plan.

(3) If the plan is unfunded, the report shall include the total benefits paid to retired employees for the past five years, broken down by year.

II. Excerpts from the Employee Retirement Income Security Act of 1974, 88 Stat. 829 *et seq.*, 29 U.S.C. § 1001, *et seq.*

Section 102, ERISA, provides as follows:

Sec. 102. (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1).

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1). Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D).

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act).

Section 103(a), ERISA, provides in pertinent part as follows:

Sec. 103. (a)(1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a), and shall be made available and furnished to participants in accordance with section 104(b).

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * * *

(4)(A) The administrator of an employee pension benefit plan subject to the reporting requirement of subsection (d) of this section shall engage, on behalf of all plan participants, an enrolled actuary who shall be responsible for the preparation of the materials comprising the actuarial statement required under subsection (d) of this section. In a case where a plan is not required to file an annual report, the requirement of this paragraph shall not apply, and, in a case where by reason of section 104(a)(2), a plan is required only to file a simplified report, the Secretary may waive the requirement of this paragraph.

(B) The enrolled actuary shall utilize such assumptions and techniques as are necessary to enable him to form an opinion as to whether the contents of the matters reported under subsection (d) of this section—

(i) are in the aggregate reasonably related to the experience of the plan and to reasonable expectations; and

(ii) represent his best estimate of anticipated experience under the plan.

The opinion by the enrolled actuary shall be made with respect to, and shall be made a part of, each annual report.

(C) For purposes of this title, the term "enrolled actuary" means an actuary enrolled under subtitle C of title III of this Act.

(D) In making a certification under this section the enrolled actuary may rely on the correctness of any accounting matter under section 103(b) as to which any qualified public accountant has expressed an opinion, if he so states his reliance.

Section 103(b), ERISA, provides as follows:

(b) An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

(2) With respect to an employee pension benefit plan: a statement of assets and liabilities, and a statement of changes in net assets available for plan benefits which shall include details of revenues and expenses and other changes aggregated by general source and application. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant; a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; the funding policy (including policy with respect to prior service cost), and any changes in such policies during the year; a description of any significant changes in plan benefits made during the period; a description of material lease commitments, other commitments and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of such pension plan.

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

(D) a schedule of each transaction involving a person known to be party in interest, the identity of such party in interest and his relationship or that of any other party in interest to the plan, a description of each asset to which the transaction relates; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction;

(E) a schedule of all loans or fixed income obligations which were in default as of the close of the plan's fiscal year or were classified during the year as uncollectable and the following information with respect to each loan on such

schedule (including a notation as to whether parties involved are known to be parties in interest): the original principal amount of the loan, the amount of principal and interest received during the reporting year, the unpaid balance, the identity and address of the obligor, a detailed description of the loan (including date of making and maturity, interest rate, the type and value of collateral, and other material terms), the amount of principal and interest overdue (if any) and an explanation thereof;

(F) a list of all leases which were in default or were classified during the year as uncollectable; and the following information with respect to each lease on such schedule (including a notation as to whether parties involved are known to be parties in interest): the type of property leased (and, in the case of fixed assets such as land, buildings, leasehold, and so forth, the location of the property), the identity of the lessor or lessee from or to whom the plan is leasing, the relationship of such lessors and lessees, if any, to the plan, the employer, employee organizations, or any other party in interest, the terms of the lease regarding rent, taxes, insurance, repairs, expenses, and renewal options; the date the leased property was purchased and its cost, the date the property was leased and its approximate value at such date, the gross rental receipts during the reporting period, expenses paid for the leased property during the reporting period, the net receipts from the lease, the amounts in arrears, and a statement as to what steps have been taken to collect amounts due or otherwise remedy the default;

(G) if some or all of the assets of a plan or plans are held in a common or collective trust maintained by a bank or similar institution or in a separate account maintained by an insurance carrier or a separate trust maintained by a bank as trustee, the report shall include the most recent annual statement of assets and liabilities of such common or collective trust, and in the case of a separate account or

a separate trust, such other information as is required by the administrator in order to comply with this subsection; and

(H) a schedule of each reportable transaction, the name of each party to the transaction (except that, in the case of an acquisition or sale of a security on the market, the report need not identify the person from whom the security was acquired or to whom it was sold) and a description of each asset to which the transaction applies; the purchase or selling price in case of a sale or purchase, the rental in case of a lease, or the interest rate and maturity date in case of a loan; expenses incurred in connection with the transaction; the cost of the asset, the current value of the asset, and the net gain (or loss) on each transaction. For purposes of the preceding sentence, the term "reportable transaction" means a transaction to which the plan is a party if such transaction is—

(i) a transaction involving an amount in excess of 3 percent of the current value of the assets of the plan;

(ii) any transaction (other than a transaction respecting a security) which is part of a series of transactions with or in conjunction with a person in a plan year, if the aggregate amount of such transactions exceeds 3 percent of the current value of the assets of the plan;

(iii) a transaction which is part of a series of transactions respecting one or more securities of the same issuer, if the aggregate amount of such transactions in the plan year exceeds 3 percent of the current value of the assets of the plan; or

(iv) a transaction with or in conjunction with a person respecting a security, if any other transaction with or in conjunction with such person in the plan year respecting a security is required to be reported by reason of clause (i).

(4) The Secretary may, by regulation, relieve any plan from filing a copy of a statement of assets and liabilities (or other information) described in paragraph (3)(G) if such statement and other information is filed with the Secretary by the bank or insurance carrier which maintains the common or collective trust or separate account.

Section 103(c), ERISA, provides as follows:

(c) The administrator shall furnish as a part of a report under this section the following information:

(1) The number of employees covered by the plan.

(2) The name and address of each fiduciary.

(3) Except in the case of a person whose compensation is minimal (determined under regulations of the Secretary) and who performs solely ministerial duties (determined under such regulations), the name of each person (including but not limited to, any consultant, broker, trustee, accountant, insurance carrier, actuary, administrator, investment manager, or custodian who rendered services to the plan or who had transactions with the plan) who received directly or indirectly compensation from the plan during the preceding year for services rendered to the plan or its participants, the amount of such compensation, the nature of his services to the plan or its participants, his relationship to the employer of the employees covered by the plan, or the employee organization, and any other office, position, or employment he holds with any party in interest.

(4) An explanation of the reason for any change in appointment of trustee, accountant, insurance carrier, enrolled actuary, administrator, investment manager, or custodian.

(5) Such financial and actuarial information including but not limited to the material described in subsections (b) and (d) of this section as the Secretary may find necessary or appropriate.

Section 103(d), ERISA, provides as follows:

(d) With respect to an employee pension benefit plan (other than (A) a profit sharing, savings, or other plan, which is an individual account plan, (B) a plan described in section 301(b), or (C) a plan described both in section 4021(b) and in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 301(a)) an annual report under this section for a plan year shall include a complete actuarial statement applicable to the plan year which shall include the following:

(1) The date of the plan year, and the date of the actuarial valuation applicable to the plan year for which the report is filed.

(2) The date and amount of the contribution (or contributions) received by the plan for the plan year for which the report is filed and contributions for prior plan years not previously reported.

(3) The following information applicable to the plan year for which the report is filed: the normal costs, the accrued liabilities, an identification of benefits not included in the calculation; a statement of the other facts and actuarial assumptions and methods used to determine costs, and a justification for any change in actuarial assumptions or cost methods; and the minimum contribution required under section 302.

(4) The number of participants and beneficiaries, both retired and nonretired, covered by the plan.

(5) The current value of the assets accumulated in the plan, and the present value of the assets of the plan used by the actuary in any computation of the amount of contributions to the plan required under section 302 and a statement explaining the basis of such valuation of present value of assets.

(6) The present value of all of the plan's liabilities for nonforfeitable pension benefits allocated by the termination

priority categories as set forth in section 4044 of this Act, and the actuarial assumptions used in these computations. The Secretary shall establish regulations defining (for purposes of this section) "termination priority categories" and acceptable methods, including approximate methods, for allocating the plan's liabilities to such termination priority categories.

(7) A certification of the contribution necessary to reduce the accumulated funding deficiency to zero.

(8) A statement by the enrolled actuary—

(A) that to the best of his knowledge the report is complete and accurate, and

(B) the requirements of section 302(c)(3) (relating to reasonable actuarial assumptions and methods) have been complied with.

(9) A copy of the opinion required by subsection (a)(4).

(10) Such other information regarding the plan as the Secretary may by regulation require.

(11) Such other information as may be necessary to fully and fairly disclose the actuarial position of the plan.

Such actuary shall make an actuarial valuation of the plan for every third plan year, unless he determines that a more frequent valuation is necessary to support his opinion under subsection (a)(4) of this section.

Section 104(a)(1), ERISA, provides as follows:

Sec. 104. (a)(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

Section 105, ERISA, provides in pertinent part as follows:

Sec. 105. (a) Each administrator of an employee pension benefit plan shall furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information—

(1) the total benefits accrued, and

(2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

(b) In no case shall a participant or beneficiary be entitled under this section to receive more than one report described in subsection (a) during any one 12 month period.

Section 3004, ERISA, provides as follows:

(a) Whenever in this Act or in any provision of law

amended by this Act the Secretary of the Treasury and the Secretary of Labor are required to carry out provisions relating to the same subject matter (as determined by them) they shall consult with each other and shall develop rules, regulations, practices, and forms which, to the extent appropriate for the efficient administration of such provisions, are designed to reduce duplication of effort, duplication of reporting, conflicting or overlapping requirements, and the burden of compliance with such provisions by plan administrators, employers, and participants and beneficiaries.

(b) In order to avoid unnecessary expense and duplication of functions among Government agencies the Secretary of the Treasury and the Secretary of Labor may make such arrangements or agreements for cooperation or mutual assistance in the performance of their functions under this Act, and the functions of any such agency as they find to be practicable and consistent with law. The Secretary of the Treasury and the Secretary of Labor may utilize, on a reimbursable or other basis, the facilities or services, of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services, of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary of the Treasury and the Secretary of Labor and, to the extent permitted by law, to provide such information and facilities as they may request for their assistance in the performance of their functions under this Act. The Attorney General or his representative shall receive from the Secretary of the Treasury and the Secretary of Labor for appropriate action such evidence developed in the performance of their functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this subchapter or other Federal law.